

## The Introduction of a Refinance Register provides additional Comfort to German True Sale Securitizations

In the existing legal environment, true sale securitizations subject to German law work well if the securitization involves assets and collateral which are transferable by mere contractual agreement between the parties. For the further promotion of true sale securitizations, German law was amended for simplifying true sale securitizations in particular for those asset classes and collateral which presently require the costly and time consuming registration of collateral in the land register (e.g. mortgages and land charges). The driving idea behind such changes to German law is that the parties to securitizations will no longer be required to perfect the transfer of the relevant collateral, in order to protect the beneficiary in the event of the seller's insolvency. The new legislation will grant „insolvency-proof“ access to the seller's assets and collateral if the beneficiary's claim to such assets and/or collateral is registered in a new refinance register (*Refinanzierungsregister*).

On 30 June 2005 the Act on the Creation of a Refinance Register (*Gesetz zur Neuorganisation der Bundesfinanzverwaltung und zur Schaffung eines Refinanzierungsregisters*) passed German parliament *Bundestag*. The purpose of the new provisions implemented in German legislation is to eliminate insolvency hurdles for German true sale securitizations and to ensure that an insolvency-remote Special Purpose Vehicle („SPV“) (*Zweckgesellschaft*) may acquire by means of a German law true sale the assets which make up the collateral in an asset-backed securities or other refinance transaction. The concept of the new provisions is to allow 'insolvency-proof' access by the SPV to the relevant assets of the originator (serving as collateral) in the event of the originator's insolvency without requiring a German law transfer of title to such asset.

In order to achieve this goal, the new legislation will introduce a refinance register into German law which shall allow assets of the originator to be registered in a refinance register for the benefit of a creditor to be claimed by such creditor in the event of the originator's insolvency.

### Credit Institutes may keep Refinance Registers – Assets Eligible for Registration

In general, if a refinance enterprise is a credit institute and if a SPV, a refinance arranger or a mortgage bank has either (i) a claim on the transfer of receivables against the refinance enterprise or (ii) a claim on the transfer of land charges or mortgages against the refinance enterprise securing receivables, then such assets are

eligible for registration in a refinance register which will be kept by such refinance enterprise. The same applies with respect to registered liens on aircrafts and ship mortgages.

Refinance enterprises are characterized as enterprises selling assets of their business operations to a SPV for refinancing purposes. Refinance arrangers are defined as credit institutions which acquire assets from a refinance enterprise or claims to acquire assets from a refinance enterprise, for the purpose of transferring such assets to SPVs or other refinance arrangers (the latter will in particular allow that intermediaries in securitizations i.e. in the course of multi-seller or cross border securitizations keep refinance registers).

The refinance register will be kept by the refinance enterprise itself (provided the refinance enterprise is a credit institute or another entity listed in Sec. 2 para. 1 No. 1 to 3a of the German Banking Act). If the refinance enterprise is not authorized for keeping a refinance register, the refinance register will then be kept by another credit institute or by KfW.

Assets not subject to German law could also be eligible for registration provided that the originator has the legal capacity to transfer title to such asset. With respect to the transferability of claims, the new legislation provides that an oral or implicit agreement on non-transferability will not exclude claims from registration in the refinance register and sale of registered assets. The German legislator reacted thereby to the decision of the Frankfurt Court of Appeals which held in May 2004 that claims arising out of a German banking relationship could require due to general banking secrecy principles, the consent of the bank's customer for a transfer of such claims to a third party.

### The Administration of the Refinance Registers

The planned legislation provides that the following elements have to be registered in the applicable refinance register (i) the applicable asset, (ii) the beneficiary (i.e. the entity who may claim the registered asset), and (iii) the date (including exact time) of registration. If the registered asset secures another asset as collateral (e.g. mortgages securing a loan) then the legal reason for the collateralization and its scope also need to be registered. The registered information will be sufficient if it allows the registered asset to be identified by third parties (i.e. identification of assets by reference to credit files etc.).

For each register-keeping enterprise a natural person has to be appointed as administrator (*Verwalter*). The appointment is effected by the German regulator BaFin upon the proposal of the registerkeeping enterprise, provided that the proposed administrator has the required independence, reliability and expertise. Upon the request of the register-keeping enterprise, BaFin will also appoint a deputy administrator. The main task of the administrator of the register is to ensure that the register is kept in compliance with the applicable provisions governing the refinance register, however, the administrator is not in charge for keeping the refinance register itself or for reviewing whether the registered assets are eligible for registration.

### The Trustee of the Refinance Register

In the event that insolvency proceedings are commenced against an insolvent enterprise which keeps a refinance register not exclusively for third party assets, the insolvency court will appoint upon application of the regulator BaFin one or two trustees (*Sachwalter*) of the refinance register. The regulator BaFin may also appoint one or two trustees of the refinance register in case of a threat of insolvency (as defined in Sec. 46a of the German Banking Act). The appointment as well as the withdrawal of the appointment of the trustee of the refinance register will be publicly announced and will be registered in the commercial register. The trustee of the refinance register will be supervised by the insolvency court. The insolvency administrator and the trustee of the refinance register have to exchange all information which are required for the administration of the assets registered in the refinance register. As far as the enterprise keeping the refinance register was entitled to administer the assets, such administration right as well as the right to transfer title or to encumber such registered assets passes to the trustee of the refinance register; furthermore, the trustee of the refinance register may use in coordination with the insolvency administrator the infrastructure of the register keeping enterprise which is required for the administration of the registered asset. The fact that the trustee of the refinance register may continue to use the servicer's infrastructure will reduce for securitization transactions the need for replacing a servicer by a substitute servicer in case of servicer's insolvency provided that such servicer kept a refinance register.

### The „True Sale“ effect of the Refinance Register

Assets of the refinance enterprises and of the refinance arrangers which have been properly registered in the refinance register are deemed to be an asset of the beneficiary in the case of the insolvency of the owner of such asset. Notwithstanding of the registration of an asset in the refinance register, a registered asset may be as-

signed or encumbered by the owner of such asset. Structures may therefore seek additional protection by registration of an asset in the refinance register for the benefit of a SPV and the subsequent transfer of title to such registered asset to the SPV.

The proper registration of an eligible asset in the refinance register entitles the registered beneficiary to object and offers a defense to an enforcement or commencement of insolvency procedures impairing the beneficiary's rights. The main effect of an asset registration in a refinance register is that the beneficiary may claim separation in the event of the originator's insolvency (*Aussonderungsrecht*) within the meaning of Sec. 47 of the German Insolvency Code. Such asset will cease to form part of the insolvency estate of the originator and is not exposed to the risk that the beneficiary is limited to preferential satisfaction (*abgesonderte Befriedigung*) which would entitle the insolvency administrator to a commission of approximately 9% of the proceeds on enforcement/foreclosure of the beneficiary's asset. The new legislation provides further that such right for separation (*Aussonderungsrecht*) resulting from the proper registration of an asset in the refinance register will protect not only the registered asset itself but also assets replacing properly registered assets. This has the consequence that a creditor may claim in case of a refinance enterprise's insolvency, the collections the refinance enterprise had cashed for a properly registered asset. This feature reduces the commingling risk and the registration of an asset in the refinance register will be interesting also for non-mortgage ABS transactions. However, the registration of an asset in the refinance registration will have no impact on or limit third party defenses or set-off rights.

### Résumé

The introduction of the refinance registers into German law will offer a second true sale concept for German law true sale securitizations. As a result of the limitation of the commingling risk, the refinance register will provide additional comfort also for such assets classes which are transferable by mere agreement (e.g. loan or lease receivables). The introduction of the registers will provide no additional comfort (compared to the present legal situation) with respect to set-off risk exposure (i.e. that a third party debtor has valid counterclaims against the originator which entitle such third party debtor to the right to set-off). The refinance register will allow the cost effective and easy collateralization of mortgage-backed securities. Once a land charge or mortgage is registered in the land register for the benefit of the originator, the originator may secure its refinancing creditors by mere registration of the land charges or mortgages in the refinance register without requiring costly and time consuming registrations in the land register.

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